

**Delco Dev. of Port Washington, L.P. v Stop & Shop
Supermarket Co.**

2009 NY Slip Op 31897(U)

August 11, 2009

Supreme Court, Nassau County

Docket Number: 126/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

DELCO DEVELOPMENT OF PORT
WASHINGTON, L.P.,

Plaintiff,

INDEX No. 126/09

MOTION DATE: July 8, 2009
Motion Sequence # 001

-against-

THE STOP & SHOP SUPERMARKET
COMPANY, k/n/a THE STOP & SHOP
SUPERMARKET COMPANY LLC,

Defendant.

The following papers read on this motion:

- Order to Show Cause..... X
- Affidavit in Opposition..... X
- Reply Affirmation X
- Sur-Reply Affidavit..... X
- Memorandum of Law..... XX

This motion, by plaintiff, brought on by order to show cause, for an order pursuant to CPLR 6301, preliminarily enjoining the defendant and all those acting in concert with the defendant during the pendency of this action and until final judgment is entered herein, from interfering with plaintiff's right of first offer embodied in Article 15 of the Reciprocal Cross Operating Easement Agreement ("RCOEA") dated June 9, 2003 between Delco Development Company of Port Washington, L.P. ("Delco") and Stop & Shop, is determined as hereinafter set forth.

DELCO DEVELOPMENT OF PORT WASHINGTON, L.P. Index no. 126/09**FACTS**

The plaintiff and the defendant entered into a Reciprocal Cross Operating Easement Agreement (“RCOEA”) on June 9, 2003. Article 15 of the RCOEA provides that if the plaintiff or the defendant ever proposes or desires to sell all or any portion of its interest in the shopping center, the seller shall give the other party, the offeree, written notice of such intention. Article 15 also provides that this written notice shall provide all material terms and conditions of such proposed sale, including the gross cash price and any payment terms which the seller is willing to accept. The seller must also give the offeree detailed notice regarding all outstanding mortgages, security interest, attachments, tax claims, leases and other pecuniary items affecting the title to the interest in the shopping center offered for sale.

Under Article 15, the offeree then has the option of accepting this offer within ninety days following the offeree’s receipt of the seller’s offer. If the offeree fails to accept the offer or rejects it within ninety days of the offeree’s receipt of the offer, then the seller has twelve months to sell the interest to anyone for a gross cash price greater than or equal to 95% of the price offered to the offeree. Article 15 also provides that if the offeree accepts seller’s offer, the seller shall convey a deed that is at least the equivalent of a New York “bargain and sale deed with covenants against the grantor’s acts” and shall convey a good and clear record and marketable title to the property offered.

On October 10, 2008, the defendant sent a letter to the plaintiff pursuant to Article 15 offering to sell a portion of the shopping center for \$1,400,000.00. The defendant’s letter requests an initial deposit of \$70,000.00 payable upon the plaintiff’s acceptance of the offer and an additional deposit of \$70,000.00 payable at the completion date at which time both deposits shall be non-refundable. The offer requires the defendant to deliver a bargain and sale deed without covenant conveying fee simple title free from encumbrances except for the defendant’s standard use restrictions and the RCOEA. It also requires the subject property to be subdivided at the plaintiff’s expense no later than ninety days from the completion date.

In response, the plaintiff sent a letter to the defendant on October 27, 2008 stating that the defendant’s letter failed to constitute notice as required by Article 15 of the RCOEA. The plaintiff asserts that the defendant fails to set forth all material terms and conditions of the proposed sale such as whether the deposits will be held in escrow and

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under what terms; whether the defendant has an obligation to refund the plaintiff's deposits; the state of title required to be conveyed; whether there will be adjustments in the event of default; and what standard use and other restrictions and cross-easements are required.

The plaintiff commenced this action against the defendant by filing a summons and complaint on June 6, 2009. The plaintiff alleges breach of contract and entitlement to an injunction enjoining and restraining the defendant from denying the plaintiff its rights with respect to the purchase of the subject property.

PLAINTIFF'S CONTENTIONS

The plaintiff contends that it is being denied its right to purchase the subject property on commercially reasonable business terms that are consistent with New York State real estate practice by the defendant's actions. The plaintiff also contends that it has not been given an opportunity to fairly negotiate an independent agreement with the defendant without interference from third parties, which is the basis for the right of first offer rather than a right of first refusal in the RCOEA.

The plaintiff asserts that the defendant's inadequate notice prevents the plaintiff from asserting its right of first offer. The plaintiff argues that the defendant is trying to defeat the RCOEA by requiring that the property be subdivided in ninety days because it is impossible for the Town of North Hempstead and Village of Port Washington to approve the contemplated subdivision within ninety days.

The plaintiff also asserts that the defendant breached the RCOEA by marketing the sale of the property through SRS Real Estate Partners as advertised on the Internet on September 26, 2008 before making a first offer to the plaintiff. The plaintiff also argues that the defendant also breached the RCOEA by negotiating the terms and exchanging drafts of a sale contract with a third-party.

The plaintiff avers that the motion for preliminary injunction should be granted because the plaintiff is likely to succeed on the merits and the plaintiff will suffer immediate and irreparable harm if this Court does not enjoin the defendant from selling the property to an undisclosed third-party, defeating the plaintiff's bargained-for right of first offer under the RCOEA; and that the equities balance in its favor because it negotiated the right of first offer and there is no allegation that it breached the RCOEA.

DEFENDANT'S CONTENTIONS

The defendant contends that it has not breached the RCOEA; that the notice it sent to the plaintiff on October 10, 2008 contained the material terms of the offer, including purchase price, required deposit, due diligence period, title and closing costs. The defendant asserts that the RCOEA does not prevent it from listing or marketing the subject property; only that before contracting to sell or transfer the property, it must be offered to the plaintiff on terms set by the defendant, and that the RCOEA does not prevent it from exchanging drafts or agreements with any third-parties.

The defendant also contends that the plaintiff has refused to either accept or reject the terms of the notice and has instead chosen to delay and obtain a temporary restraining order to prevent the defendant from going forward with the sale of the property to the plaintiff or a third-party. The defendant asserts that the plaintiff either misunderstands or is intentionally misconstruing the specific terms and conditions of Article 15 of the RCOEA in order to interfere with the defendant's business interests and/or to gain a business advantage in favor of the plaintiff.

The defendant asserts that the right of first offer set forth in Article 15 does not give the offeree the right to negotiate a sale. Article 15 gives the seller the right to state the price and other material terms upon which it will sell the real estate. The offeree then has the right to either accept or not accept the offered terms of the sale within ninety days of the receipt of the offer; the offeree has no other option. The defendant contends that the plaintiff does not like the defendant's offer and wants to negotiate a sale more to plaintiff's liking or prevent the defendant from attempting to sell the property to a third-party; these are not the rights or privileges granted to the plaintiff under the RCOEA. The defendant further argues that the plaintiff has no cause to complain unless and until the defendant sells the property to a third-party for less than 95% of the price offered to the plaintiff or upon other terms and conditions that are materially more favorable than the terms set forth in seller's offer. The defendant avers that the RCOEA does not give the plaintiff the right to see or review an agreement with a third-party or to know the identities of third-parties that may be interested in purchasing the property. The defendant asserts that the plaintiff is confusing the right of first offer with right of first refusal plus a right of further negotiations. The defendant further avers that the plaintiff fails to meet its burden as to any of the threshold requirements necessary for granting a preliminary injunction pursuant to Article 63 of the C.P.L.R. First, the defendant contends that the plaintiff's cause of action is meritless because it misconstrues the

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meaning of the RCOEA. Second, the defendant contends that the plaintiff has failed to prove why and how it will suffer irreparable harm from the sale of the subject property to a third-party when the plaintiff chose not to accept the defendant's offer. Third, the defendant contends that the balancing of the equities favors the defendant because the ninety-day period for the plaintiff to accept the offer expired months ago. Thus, it would be unfair to the defendant to further prevent it from asserting its right to control its property and sell it when it chooses.

DECISION

Pursuant to C.P.L.R. § 6301, a preliminary injunction may be granted when it appears that the defendant is about to do, or is doing, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued while the action is pending, would produce injury to the plaintiff.

In order to grant a preliminary injunction, the plaintiff must clearly demonstrate (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) a balancing of equities in favor of the plaintiff. (Winzelberg v. 1319 50th Realty Corp., 52 A.D.3d 700, 860 N.Y.S.2d 185, 2nd Dept., 2008; Olabi v Mayfield, 8 A.D.3d 459, 2nd Dept., 2004; Doe v. Axelrod, 73 N.Y.2d 748, 536 N.Y.S.2d 44, 532 N.E.2d 1272, 1988).

“Section 15.02. If Delco or Stop & Shop ever proposes or desires to sell all or any portion of its interest in the Shopping Center (such party being hereafter deemed “Seller”), Seller shall give the other party (“Offeree”) written notice of such intention, which notice (“Seller's Offer”) shall set forth all material terms and conditions of such proposed sale (including, without limitation, the gross cash price and any payment

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terms which Seller is willing to accept) and shall constitute an offer to sell the Seller's interest in the Shopping Center or applicable portion thereof, to Offeree at the gross cash price and upon the terms stated therein. In order to properly actuate Offeree's obligation to respond to Seller's Offer, Seller's Offer must be upon terms and conditions susceptible of being performed by a financially responsible party and, at the time Seller sends to Offeree Seller's Offer, Seller shall also give to Offeree a detailed notice regarding all outstanding mortgages, security interests, attachments, tax claims, leases and other pecuniary items affecting the title to the interest in the Shopping Center offered for Sale.

Section 15.03. At Offeree's option, Offeree's acceptance of Seller's Offer shall be by written notice given within ninety (90) days following Offeree's receipt of Seller's Offer. Offeree's acceptance shall set a date of closing not less than sixty (60) nor more than ninety (90) days after receipt by Seller of Offeree's acceptance.

Section 15.04. It is the contemplation of the parties that Seller's Offer to Offeree pursuant to **Section 15.02** shall be made by Seller in good faith and that the offering price will be based upon Seller's good

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faith estimate of the then fair market value of the property, and that the other terms and conditions of the offer shall be in accordance with normal and customary practice in the State of New York”.

An analysis of the language and terms of the RCOEA, specifically Article 15, this Court determines that the defendant/Seller has provided the plaintiff with an offer that satisfies the terms of that agreement, fulfills the technical requirements of that portion of the RCOEA. The RCOEA does not give the plaintiff the right to negotiate the terms of the defendant's offer of sale. As a result, the plaintiff had the option to either accept the offer of sale as is or reject the offer of sale. In effect, while being specific, the Article 15 is, effectively, an agreement to agree with restrictions. In addition, the RCOEA does not contain any provision prohibiting the defendant from listing or marketing the subject property nor does it prevent the defendant from exchanging drafts or agreements with any third-parties. Therefore, the defendant has not breached the RCOEA by marketing the subject property or exchanging drafts with third-parties as the plaintiff alleges. Thus, the plaintiff has not demonstrated that it is likely to succeed on the merits and is therefore not entitled to a preliminary injunction.

With respect to the second criterion, that the plaintiff will suffer irreparable harm absent the granting of this application, the plaintiff has not shown this Court, with demonstrable evidence, how it would be irreparably harmed if it has not agreed to the offer made by the seller/defendant. Additionally, the plaintiff's assertions of irreparable harm are conclusory in nature.

With respect to the third and last criterion necessary for a preliminary injunction, i.e., that a balancing of the equities favors the plaintiff, the clear terms of Article 15 has certain time limits, and the instant application appears to limit the defendant to freely dispose of its property.

The instant application is **denied**.

A Preliminary Conference has been scheduled for September 22, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated AUG 11 2009

ENTERED

AUG 19 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Stephen A. Bucarea
J.S.C.